No. 92-1168

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

TERESA HARRIS,
Petitioner,

v.

FORKLIFT SYSTEMS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR AMICUS CURIAE AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICUS CURIAE [1]

The American Psychological Association ("APA"), a voluntary, nonprofit, scientific, and professional organization founded in 1892, is the major association of psychologists in the United States. APA has more than 114,000 members and includes the vast majority of psychologists holding doctoral degrees from accredited universities in this country. APA's major purposes are to promote psychological research, to improve research meth-

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[1] The parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of this Court.

ARGUMENT

I. THE PREVAILING CONCEPT OF A "HOSTILE WORK ENVIRONMENT" MUST BE RE-EXAMINED IN ORDER TO AVOID SUBSTANTIAL DETRIMENT TO IMPORTANT FIRST AMENDMENT INTERESTS, BY RESTORING AS THE PROPER FOCUS OF THAT THEORY THE NOTION OF *DISCRIMINATORY HARASSMENT*.

This case presents the Court with an overdue opportunity to re-examine the Title VII "hostile work environment" cause of action, which has become a morass of doctrinal confusion as the lower courts have increasingly strayed from the statute's essential focus on combatting discrimination. The courts' failure thus far to address the endemic free speech problems with this Title VII theory is particularly troubling, and unnecessary because the interests of free speech and combatting discrimination in the workplace are eminently reconcilable under a properly-crafted standard for Title VII liability.

The standard which most sensibly harmonizes these interests, and which should apply equally to claims based on gender-based and racially

motivated harassment, is the following: **in order to establish Title VII liability on hostile work environment grounds, a plaintiff must demonstrate a pattern or practice of conduct or expression which targets the plaintiff employee(s), which a reasonable person would experience as harassment, and which has substantially hindered the plaintiff's job performance.** Expression which would otherwise be protected by the First Amendment, i.e., expressing racially or gender-biased opinions, or the mere display or possession of "offensive" materials, should not be actionable without an additional showing of discriminatory intent to harass women or minority workers. (Indeed, as argued further below, the additional element of intent to harass would justify treating the speech or expression as harassment, removing it from the sphere of First Amendment protection.)

Unfortunately, many courts deciding cases under this Title VII theory have ignored the First Amendment interests at stake. Because the courts have applied vague and subjective standards for "harassment," the threat of

hostile work environment liability causes employers to over-regulate what is fairly regarded as protected expression rather than harassment. Worse still, in fashioning remedies in hostile work environment cases, the courts have actually begun to order employers to prohibit even discreet private possession of any materials with sexual content, thus imposing a direct prior restraint on protected expression and materials. *See, e.g., Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1541-1543 (M.D. Fla. 1991), appeal pending (11th Cir. No. 91-2635). As so applied, Title VII egregiously violates the First Amendment due to overbreadth and viewpoint discrimination, and as a prior restraint on protected expression.

The facts of present case do not directly implicate the more extreme free speech concerns which have come prominently to the fore in recent cases such as *Jacksonville Shipyards*, because the conduct Ms. Harris alleges to have created a hostile work environment all falls within the category of targeted, abusive behavior which under a proper objective standard

might well be determined to constitute harassment rather than expression protected by the First Amendment. This case does, however, illustrate the central conceptual problems which have diverted the courts from an appropriate Title VII focus on invidious *harassment*. For the most part, the courts have relied on inappropriately *subjective* standards for discerning actionable harassment, either facilely equating mere "offensiveness" with harassment, or, as in this case, requiring that the plaintiff demonstrate serious psychological harm before conduct becomes actionable. This focus on the plaintiff's subjective reactions to various types of workplace conduct or speech has distracted the courts from a proper emphasis on the objective inquiry as to whether the complained-of behavior is in fact reasonably regarded as harassment, blurring necessary distinctions between conduct or expression that targets an employee for abuse, and protected expression that does not.

These subjective standards are either overbroad in violation of the First Amendment --

creating liability for protected speech not fairly viewed as harassment, merely on grounds of its asserted "offensiveness" -- and/or under-protective of Title VII interests. Holding plaintiffs such as Ms. Harris to an unrealistic and unfairly high standard of proving serious psychological harm, regardless of whether invidious harassment in fact impeded her job performance, may also impose liability for protected speech, based on the plaintiff's subjective reactions. Thus the current standards are both blind to important First Amendment concerns and inadequate to the statutory purpose of combatting workplace discrimination.

"Title VII is not a 'clean language act,'" as some courts and commentators have wisely noted. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 Ohio St. L.J. 481, 492 (1991), quoting *Katz v. Dole*, 709, F.2d 251, 156 (4th Cir. 1983). Its purpose is to eradicate workplace discrimination, including invidious harassment on the basis of race or gender.

Judicial attempts to expand its focus to sanitize the workplace of all "offensiveness" or sexuality yield unconstitutionally censorial results. Under the wide-ranging approach to Title VII liability which has emerged in the reported decisions, courts and employers are imposing restrictions designed to "reduce the adult population to reading only what is fit for children," an unconstitutional result this Court has condemned at least since *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

Moreover, such efforts are in fact counter-productive in terms of the statutory goal of gender equality. The paternalistic project of sanitizing workplace speech in defense of women workers enshrines archaic stereotypes of women as delicate, asexual creatures who require special protection from mere words and images. It may very well create additional antagonisms toward women whose entry into male-dominated professions is perceived as occasioning unwarranted intrusions into the sphere of personal liberty. Also, such overbroad regulations of speech threaten not only to

censor the speech of the swearing male dockworker, but to curtail the free speech of the woman who chooses to read *Playgirl* on her lunch break or to display a pro-choice poster which might offend co-workers on religious grounds.

As applied in most recent decisions, hostile work environment theory has gone fundamentally awry in relation to both the statutory purpose and First Amendment limitations. It is overbroad, creates viewpoint discrimination regarding racial and gender issues, and has been taken to authorize blatant judicial prior restraints on workers' protected speech and access to protected materials. These problems are avoidable by mooring the hostile work environment theory to its proper foundations of actual discriminatory harassment, and FFE respectfully urges this Court to do so by drawing the principled distinction between such harassment and protected expression.

A. Women deserve Title VII protection from *gender-based* harassment, but neither need nor ultimately benefit from misguided attempts to rid the workplace of all expression regarding sexuality.

As feminists dedicated to both advancing equality in the workplace and preserving free speech rights, FFE is particularly concerned about the diversionary and counter-productive focus on *sexual* speech in hostile work environment cases. Semantic confusion has given rise to doctrinal confusion as the concept of "sexual harassment" has often been defined exclusively in terms of sexual conduct or speech, rather than as harassment motivated by gender bias, whatever its particular content. Because the current emphasis on *sexual* behavior under the EEOC guidelines is unduly narrow and misleading, FFE urges this Court to clarify that Title VII protects women from *gender-based* harassment, not just harassment that takes a sexual form, as well as to limit the concept of harassment so as to exclude protected speech.

Title VII provides a statutory basis for combatting employment discrimination, providing

that it is an unlawful employment practice for an employee "to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000(e)-2(a)(1). The courts have recognized two types of "sexual harassment" as constituting actionable discrimination under this provision: "*quid pro quo*" harassment, which typically involves a supervisor's demands for sexual favors and which is not at issue in this case, and "hostile work environment" harassment of the sort at issue here. In *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66, 73 (1986), a case which involved both types of sexual or gender-based harassment, this Court held that such "hostile environment" discrimination was actionable under Title VII.

Vinson involved sexual harassment in the "purest" sense, and did not raise any free speech concerns whatsoever. The plaintiff in *Vinson* alleged that her supervisor demanded sexual favors and that she acquiesced for fear

of losing her job, that he fondled her in the workplace in front of other employees, exposed himself to her, and forcibly raped her. 477 U.S. at 62. This Court concluded that such sexual harassment constitutes gender-based discrimination regardless of whether the resulting injury is economic or psychological. *Id.* at 64. In the context of the *Vinson* facts, the Court endorsed the EEOC guidelines which define "sexual harassment" to include "verbal or physical conduct *of a sexual nature* [that] has the purpose or effect of unreasonably interfering with an individual's job performance or creating an intimidating, hostile or offensive work environment." 29 C.F.R. § 1604.11(a)(3); *see Vinson*, 477 U.S. at 65.

Although these EEOC Guidelines make some sense in relation to the factual scenario *Vinson* represents, their lack of clarity regarding the concept of harassment has created a wellspring of confusion to the detriment of any comprehensive hostile work environment theory. First, these guidelines are both under-inclusive and misleading in their one-sided definition of

actionable harassment as involving behavior "of a *sexual* nature," instead of defining the offense as *gender-based* harassment regardless of whether the abuse is sexual in nature. Second, as discussed further below (see Section I.B.), the definition of sexual harassment to include any "verbal conduct" that creates an "offensive" work environment is egregiously overbroad and viewpoint discriminatory in its application to protected expression, and must be narrowed to comport with the First Amendment.

As the present case illustrates, a wide range of abusive behavior, such as habitually referring to women employees as "stupid" or "incompetent," may constitute *gender-based* harassment of the sort this Court considered actionable discrimination under Title VII where "sufficiently severe or pervasive 'to alter the conditions of . . . employment.'" *Vinson*, 477 U.S. at 67. Although the EEOC's definition of "sexual harassment" is to some extent understandable because of the prevalence of claims involving actual sexual conduct, it also creates confusion due to the double meaning of

"sexual" to denote both gender and sexuality. Accordingly, some courts have acknowledged that the harassment need not be "of a sexual nature," notwithstanding the EEOC definition. *See, e.g., Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3rd Cir. 1990); *Bell v. Cracklin Good Bakers, Inc.*, 777 F.2d 1497, 1503 (11th Cir. 1985); *McKinney v. Dole*, 765 F.2d 1129, 1140 (D.C. Cir. 1985). Unfortunately, however, the one-sided emphasis on *sexuality* as the essence of what should be defined as gender-based discrimination has eclipsed the essential concept of *harassment*, prompting some courts to construct a facile equation to the effect that sexual speech = offensiveness = harassment. *See Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991).

This approach focusing primarily on sexuality rather than gender-based discrimination fundamentally disserves women by perpetuating stereotypes that women are so delicate in their sensibilities that exposure to erotic materials, frank sexual discussion, or jokes will inherently intimidate and demoralize

jokes will inherently intimidate and demoralize them. "The assumption that women as a group may be more offended by profanity than men as a group seems like just the sort of stereotype that Title VII was intended to erase." Browne, *supra*, at 488.

This paternalistic approach is also harmful to both men and women workers because it is increasingly spawning court orders and employer regulations censoring virtually any sexual expression, including possession of protected materials as innocuous as *Cosmopolitan* and calendars featuring swimsuit-clad models. In the *Jacksonville Shipyards* case, for example, the district court has ordered the employer to prohibit a humorously broad array of protected materials, extending to any "sexually suggestive" reading materials and any depiction "of a person of either sex who is not fully clothed or in clothes that are not suited to or ordinarily accepted for the accomplishment of routine work in and around the shipyard and who is posed for the obvious purpose of displaying

or drawing attention to private portions of his or her body." 760 F. Supp. at 1542.

Coupled with the courts' failure to narrow the concept of "harassment" appropriately, this undue and apparently growing emphasis on cleansing the workplace of all sexual expression adversely affects all workers by occasioning such gratuitous infringement of their First Amendment rights. Undoubtedly, this over-regulation also generates hostility on the part of male workers who conclude that women's entry into the workplace has occasioned this diminution of their personal freedoms. For these reasons, the anti-sexual assumptions increasingly embedded in hostile work environment cases are not only offensively paternalistic but also probably as counter-productive to the pursuit of equality as they are destructive of free speech rights.

It is therefore crucial that this Court clarify that the gravamen of the Title VII theory is not sexuality or offensiveness but rather *gender-based discrimination*, whatever form the complained-of harassment may take. By

returning this theory to its proper basis of liability for discriminatory harassment, and by distinguishing harassment from protected speech, this Court would both effectuate the statutory purpose and avoid an unnecessary clash between that purpose and First Amendment rights.

B. Under current law, the failure to distinguish harassment from protected speech renders Title VII overbroad and viewpoint discriminatory, violating the First Amendment rights of all workers including important free speech rights of women.

The caselaw regarding hostile work environment liability reveals an alarming failure to limit the definition of "harassment" so as to exclude protected First Amendment activities. Because the courts have increasingly applied an extremely vague, subjective concept of harassment in many of these cases, sometimes resting liability on "offensive" expression such as *Penthouse* centerfolds and sexual or sexist jokes, employers are compelled to restrict such speech in order to avoid liability.

1988), employers are compelled to restrict such speech in order to avoid liability.

> A broad definition of sexual and racial harassment necessarily delegates broad powers to courts to determine matters of taste and humor, and the vagueness of the definition of 'harassment' leaves those subject to regulation without clear notice of what is permitted and what is forbidden. The inescapable result is a substantial chilling effect on expression. Holding employers liable for the offensive speech of their employees . . . creates a powerful incentive for employers . . . to censor the speech of their employees. Employers have responded to these incentives by substantially overregulating the speech of their employees.

Browne, *supra*, at 483.

Some courts, notably the district court in *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), have gone so far as to order employers to impose prohibitions extending even to mere private possession of protected reading materials. These restrictions, and the theory of liability on which they depend, are patently overbroad. They are also often viewpoint discriminatory, much like the anti-pornography ordinance invalidated in *American Booksellers Association v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd* 475 U.S.

1001 (1986), and the restrictions on "hate speech" in *R.A.V. v. City of St. Paul*, ___ U.S. ___, 112 S. Ct. 2538 (1992).[2] In cases of court-ordered restrictions of employees' protected expressive activities, Title VII has become the premise for outright prior restraints which cannot survive the extremely strict First Amendment scrutiny such restraints require under *Near v. Minnesota*, 283 U.S. 697 (1931), and its progeny.

Imposing liability for protected expression renders this Title VII theory unconstitutionally overbroad; yet numerous reported decisions involve various forms of protected speech found to constitute or contribute to a hostile work environment for women and minorities. This development is both unfortunate and unnecessary, because protected speech can easily be filtered

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[2] Although the majority in *R.A.V.* noted that "sexually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices," 112 S. Ct. at 2546, the Court clearly was referring to liability on the basis of *unprotected* expression, not speech that is protected by the First Amendment because not fairly deemed to be harassment for purposes of Title VII.

out simply by defining "harassment" in objective terms, as that word is commonly understood, limiting the concept to a **course of conduct or expression targeting the plaintiff for invidious abuse, and which a reasonable person would regard as harassment.**

Such harassing insults and other verbal abuse targeting individuals do not constitute protected speech because they directly effectuate the unlawful end of employment discrimination and are thus properly regarded as discrimination or harassment rather than as any real part of the marketplace of ideas. *See Pittsburgh Press v. Human Relations Commission*, 413 U.S. 376, 388 (1975). Similarly, in *Frisby v. Schultz*, 487 U.S. 474, 486 (1988), this Court upheld an ordinance that restricted picketing targeting a particular residence, where the basic intent was not "to disseminate a message to the general public but to intrude upon the targeted resident, and to do so in an especially offensive way." The Court deemed such intimidation and invasion of privacy to be

"fundamentally different from more generally directed . . . communication." *Id.*

Similarly, there is a great need for this Court to distinguish harassment from "more generally directed communication," to avoid unconstitutional applications of the hostile work environment theory. A prime example of the misuse of this cause of action is *Jacksonville Shipyards,* currently pending before the Eleventh Circuit. Although the plaintiff in that case alleged a great deal of abusive, gender-biased behavior targeted at her individually, the court strongly emphasized the presence of pornography in the workplace, sexually-oriented jokes, and similar expression not directed at the plaintiff as at least the partial basis for imposing liability.[3] *See* 760 F. Supp. at 1494-1498, 1513, 1524.

On this basis, the court fashioned an incredibly broad remedial order, requiring the

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[3] To impose liability based even in part upon protected expression would violate the First Amendment; *see, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

employer as noted above to prohibit its workers from engaging in a wide variety of protected expressive activities, including "reading . . . in the work environment materials that are in any way sexually revealing [or] sexually suggestive," and displaying pictures" of a person of either sex who is not fully clothed or in clothes that are not suited to or ordinarily accepted for the accomplishment of routine work in and around the shipyard and who is posed for the obvious purpose of displaying or drawing attention to private portions of his or her body." 760 F. Supp. at 1542. The overbreadth of this remedy, and the prior restraint it imposes on protected expression, egregiously violate the First Amendment.

Often, such restrictions are viewpoint-discriminatory as well. For example, they may prohibit expressions of opinion that women do not belong in the workplace, while allowing the contrary view to be expressed freely. *Cf. Jacksonville Shipyards*, 760 F. Supp. at 1526, *with American Booksellers Association v. Hudnut*,

771 F.2d 323 (7th Cir. 1985), *aff'd* 475 U.S. 1001 (1986).

Nor can liability on the basis of such protected, non-targeted expression be characterized as a "time, place or manner," restriction, because it is purely a content regulation on grounds of "offensiveness." *Cf. Boos v. Barry*, 485 U.S. 312, 321-322 (1988) ("Regulations that focus on the direct impact of speech on its audience" are content-based; the "emotive impact of speech on its audience is not a 'secondary effect.'").

Accordingly, the overbreadth of the emerging Title VII-inspired regulation of protected speech on the basis of its content cannot be justified and requires a narrowing of hostile work environment theory.

II. PETITIONER CORRECTLY ASSERTS THAT THE COURTS BELOW ERRED IN REQUIRING THAT TITLE VII PLAINTIFFS DEMONSTRATE SERIOUS PSYCHOLOGICAL HARM IN ORDER TO PREVAIL IN A HOSTILE WORK ENVIRONMENT ACTION.

Petitioner Harris correctly asserts that the standard under which the lower courts have

evaluated her hostile work environment claim, employing the test the Sixth Circuit adopted in *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986),[4] and requiring her to demonstrate previous psychological harm as an element of her claim, is contrary to this Court's approach and to the statutory purpose of Title VII. Requiring Title VII plaintiffs to prove such psychological harm as a predicate to establishing actionable harassment is an unduly subjective test which does not comport with the statute's more general prohibition against any discrimination which affects a term or condition of employment. However, because *neither* this "severe psychological harm" standard *nor* Petitioner's proposed alternative standard of "offensiveness" strikes an appropriate balance by including an objective standard that filters out protected expression from unprotected

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[4] The Eleventh Circuit in *Brooms v. Regal Tube*, 830 F.2d 1554 (11th Cir. 1987), and the Second Circuit in *Scott v. Sears Roebuck*, 798 F.2d 210 (7th Cir. 1986), have also adopted at least a modified version of this test.

harassment as the potential basis for liability, both of these tests should be rejected.

From a Title VII perspective, requiring a plaintiff to demonstrate serious psychological harm in order to prove discriminatory harassment is unfair and under-protective in relation to the statutory purpose. Clearly, the statute contemplates a remedy where the plaintiff proves discrimination which "unreasonably interfer[es] with [his or her] work performance," as this Court held in *Vinson*, 477 U.S. at 65. Discriminatory harassment could certainly become intolerable so as to result in constructive discharge, as Petitioner has alleged, without causing a plaintiff serious psychological injury. Essentially, this test would preclude a claim by the employee whose mental health remains in tact despite discriminatory harassment which has driven him or her from the workplace.

From a First Amendment perspective, moreover, neither this "psychological harm" test nor the alternative standard of mere

"offensiveness" adopted by several other courts[5] is constitutionally permissible. Both tests are unduly subjective, defining harassment by reference to subjective reactions to expression. Lacking an objective standard designed to separate out and protect expression not legitimately regarded as harassment because it does not target an individual or individuals for abuse, these tests cannot survive First Amendment scrutiny due to their overbreadth, vagueness, and resulting chilling effect on protected expression.

A. Title VII liability should be imposed only for a pattern or practice of speech or conduct targeting a specific employee or employees, which a reasonable person would experience as harassment, and which has demonstrably hindered the employee in his or her job performance.

The standard FFE urges this Court to adopt, or some close variation on this theme, appears

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[5] *See Andrews v. City of Philadelphia*, 895 F.2d 1469 (3rd Cir. 1990); *Burns v. McGregor Electronic Industries, Inc.*, 955 F.2d 559 (8th Cir. 1992); *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991).

to be the most logical and principled standard for distinguishing protected expression from harassment. By adopting such a test for hostile work environment cases, this Court could reconcile the statute's laudatory anti-discrimination goals with First Amendment protection for non-targeted, non-harassing speech. The central features of this test, which distinguish it from either of the standards the parties advocate in this case, are the requirement that the complained-of behavior *target* the plaintiff for insidious abuse, and the related objective requirement that a reasonable person in the circumstances would regard that behavior as harassment. These objective elements are consistent with the common understanding of the term "harassment," and exclude as a basis for liability non-targeted, generalized and therefore protected speech and media materials.

This test allows for a finding of Title VII liability for severe, persuasive, or repeated instances of targeted insult or abuse, and which have a demonstrable impact on the plaintiff's

job performance. This proposed standard would apply equally to cases of alleged gender and racial harassment, one token of the fact that this standard eschews the counter-productive gender-based stereotypes the courts have built into the subjective tests that have prevailed to date. Focusing on the targeted and abusive nature of the alleged harassment, this standard appropriately emphasizes the objective harm of discrimination at which the statute aims, rather than focusing on the relative delicacy of sensibilities of the woman plaintiff who must centrally show either "offense" or "psychological harm." The subjective approach removes focus from the alleged wrong-doers and inappropriately places it on the plaintiff, reinforcing stereotypes that women are psychologically delicate and need special solicitude.

Discrimination, not presumed female delicacy, should remain the essential focus of Title VII litigation. However biased and offensive expression which cannot fairly be deemed targeted, discriminatory harassment

cannot be the subject of governmental regulation under the aegis of Title VII.

B. Title VII cannot constitutionally create liability for expression protected by the First Amendment, e.g. mere display or possession of "offensive" materials, at least absent an additional showing of discriminatory intent to harass women or minorities.

The urge to censor "offensive" expression in pursuit of lofty goals is ever a strong force in our society,[6] and one which has of late made itself increasingly felt in American culture.[7] It is, however, an urge the First Amendment requires that we staunchly resist, in favor of the fundamental values of tolerance, pluralism, and the free exchange of ideas.

For all the reason noted above, non-targeted speech such as erotic posters, "Archie

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[6] *See* Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society -- From Anthony Comstock to 2 Live Crew*, 33 Wm. & Mary L. Rev. 741 (1992).

[7] *See* Pally, *Sense and Censorship: The Vanity of Bonfires* (1991).

Bunker for President" buttons, or general expressions of biased opinion like, "Women don't belong in the legal profession," may not be censored merely on grounds that they are "offensive" to women or minorities. Although these modes of expression and the attitudes they represent may be (and hopefully are) noxious to a great many Americans, the First Amendment does not allow the government to suppress them either directly by court order or indirectly by imposing Title VII liability on employers.

Certainly, if what purported to be a generalized expression of opinion where shown to be intended as harassment, it might be deemed unprotected much like the stream of personalized racial incentive. For example, display of a Ku Klux Klan poster or continual remarks that women workers are incompetent, shown in the circumstances to be intended as threats or demoralizing taunts implicitly directed at black or women employees, might become actionable in an appropriate case. Absent such a showing, however, the generalized opinion or the "offensive" poster remains protected by the

First Amendment and may not form the basis for Title VII liability.

Any other approach trivilizes the much more serious types of gender or racially-biased behavior which effectively discriminate against women and minorities. The standard suggested here protects against those forms of harassment, encouraging employers to regulate against targeted, harassing expressions of racial or gender animus while protecting employees' rights of free expression. It avoids spurious stereotypes that all women have delicate sensibilities and require protection from sexual imagery and off-color jokes. It entails an acknowledgement that the adult working public cannot, consistent with the First Amendment, be reduced to reading and viewing only that material which the most sensitive member of the work force would find inoffensive. Because the First Amendment requires no less, Amicus FFE respectfully urges this Court to adopt this objective standard and to exclude protected expression from the purview of Title VII liability.

CONCLUSION

For all the foregoing reasons, Amicus Curiae Feminists for Free Expression urges this Court to reverse the judgment below and to remand this case for reconsideration under the appropriate standard.

Respectfully submitted,

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